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Proctors for Petitioners.

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CHARLES ELMORE CR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

Nos. 424 and 425.

HILDEGARD SCHOENAMSGRUBER, by Gustav Schoenamsgruber, her guardian, *Petitioner*,

vs.

THE HAMBURG AMERICAN LINE (a corporation), Claimant of the Motorship "The Oakland", her engines, etc., *Respondent*,

and

GUSTAV SCHOENAMSGRUBER, *Petitioner*,

vs.

THE HAMBURG AMERICAN LINE (a corporation), Claimant of the Motorship "The Oakland", her engines, etc., *Respondent*,

---

SUPPLEMENTAL BRIEF FOR RESPONDENTS.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

TOPICAL INDEX

Page

The rule of the Shanferoke and Enelow cases is inapplicable to admiralty proceedings 1

Those cases were treated as if an injunction had been granted or denied by an equity court against a different court, to-wit: the law court.. 3

But in admiralty there is no such combination of two courts in one; on the contrary there is by the express terms of the Arbitration Act a continuing jurisdiction from the time the libel is filed until judgment is entered on the award.. 3

Admiralty courts have a specific statute stating what interlocutory orders are appealable. The scope of that statute should not be extended in the light of the public policy against repeated appeals in the same proceeding 4

The New York cases cited by petitioners depend upon statutory provisions in that state which differ from those governing the federal courts.. 5

An arbitration clause is not rendered ineffective by the addition of a clause invalidly purporting to waive recourse to the courts 5

Some additional citations 8

TABLE OF CASES AND AUTHORITIES

1 Benedict on Admiralty (5th ed.), p. 96, § 70 4

1 Corpus Juris, 1277-8, § 92, notes 27 and 28 4

Enelow v. New York Life Ins. Co., — U. S. —, 79 L. ed. adv. ops. 247, decided January 7, 1935..... 2, 3

Page

Goldston case (see Hosiery Mfg. Co. v. Goldston).... 5

Hosiery Mfg. Co. v. Goldston, 238 N. Y. 22, 143 N. E. 779 5

Judicial Code, § 129 (28 U. S. Code, § 227) 2, 4

Lee v. Swedish American Line, 6 F. Supp. 342..... 8

McCullough v. Clinch-Mitchell Construction Co., 71 F. (2d) 17 ..... 6, 7

Marchant v. Mead Mfg. Co., 252 N. Y. 284, 169 N. E. 386 ..... 5, 7

New York Arbitration Law, § 6-a 5

New York Practice Act, § 1448 8

New York Practice Act, § 609, 588, 631..... 5

Shanferoke etc. Corp. v. Westchester Service Corp., — U. S. —, 79 L. ed. adv. ops. 269, decided January 7, 1935 ..... 2, 3

9 U. S. Code, § 8 5

28 U. S. Code, § 227 ..... 2, 4

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SUPPLEMENTAL BRIEF FOR RESPONDENTS.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Respondents herein most respectfully ask leave to file this supplemental brief for the reasons that since preparing and filing our brief herein two decisions have been made by this Court affecting one of the issues involved herein and because of additional matters requiring comment.

The Shanferoke Case should not be applied to admiralty proceedings.

After respondents served their briefs and sent them on from San Francisco to be filed, this court rendered two decisions which have a direct bearing on the issue of jurisdiction. These cases are:

> Shanferoke etc. Corp. v. Westchester Service Corp., —— U. S. ——, 79 L. ed. adv. ops. 269, decided January 7, 1935.
>
> Enelow v. New York Life Ins. Co., —— U. S. ——, 79 L. ed. adv. ops. 247, decided January 7, 1935.

Both were actions at law. In the Enelow case an equitable defense based on fraud was set up in bar. The court stayed the proceeding at law until the equitable issues first be settled. In the Shanferoke case a defense was set up to the effect that plaintiff had failed to submit this dispute to arbitration as required by the contract sued upon. The court denied defendant's motion to stay the law action until the plaintiff submitted to arbitration.

Thus in the Enelow case proceedings at law were stayed until after the disposition of the equitable issues. In the Shanferoke case the trial court refused to stay the proceedings at law.

In both cases this court has held (to use the language of the Shanferoke case) that

> "an order granting or denying a stay based on an equitable defense or cross-bill **interposed in an action at law** under Sec. 274b, U. S. C. title 28, Sec. 398, is appealable under Sec. 129" (28 U. S. Code, Sec. 227).

The court holds that the special defense setting up the arbitration agreement is an equitable defense and that the motion for a stay is an application for an interlocutory injunction based on this special defense. In the Shanferoke case counsel did not raise the question here discussed but

this court based its opinion upon the decision in the Enelow case.

However, the Enelow case is based upon the distinction between law and equity and on its face is not applicable to admiralty, where there is no such distinction, and in fact no equity jurisdiction as such.

In the Enelow case the Chief Justice expressly points out the distinction as regards

> "an exercise of equitable jurisdiction in granting or refusing an injunction, as distinguished from a mere stay of proceedings."

In both the Enelow and Shanferoke cases the stay is treated as an exercise of jurisdiction by an equity court directed against another court, to wit, the law court, and a stay against another court is treated as an injunction, whereas a stay in the same court by inference should not be so considered.

This is made plain by the language of the Chief Justice in the Enelow case, reading as follows:

> "The power to stay proceedings in another court appertains distinctively to equity * * * and the grant or refusal of such a stay by a court of equity of proceedings at law is a grant or refusal of an injunction within the meaning of Sec. 129.
>
> "And, in this respect, it makes no difference that the two cases, the suit in equity for an injunction and the action at law in which proceedings are stayed, are both pending in the same court, in view of the established distinction between 'proceedings at law and proceedings in equity'." * * *
>
> "The same order of trial is preserved as under the system of separate courts."

This language makes it plain why the Enelow and Shanferoke cases are inapplicable to admiralty proceedings. In admiralty there is no combination of two courts. A stay in admiralty is therefore not an injunction by one court

(the equity court) against another court (the law court). In admiralty therefore a stay is "a mere stay of proceedings" in the same court and not "an exercise of equitable jurisdiction in granting or refusing an injunction" against another court. In fact it has been often said that although admiralty is influenced by equitable principles yet it has no equitable jurisdiction as such. The authorities are collected in

> 1 Benedict on Admiralty (5th ed.), pp. 96, § 70, and 1 Corpus Juris, 1277-8, § 92, note 27 and 28.

In the text first cited it is said that

> "The court of admiralty is not a court of general equity nor has it the characteristic powers of a court of equity."

Therefore a stay in admiralty is not an order denying or granting an injunction against another court and therefore is not appealable as an interlocutory order for an injunction under Sec. 129 of the Judicial Code (28 U. S. Code Sec. 227).

This conclusion is fortified by the following additional principles. As a matter of public policy repeated appeals in the same proceeding should be discouraged (our original brief, p. 19) and appeals should be allowed only from final orders completely disposing of the litigation (idem, p. 10). Therefore interlocutory appeals should not be encouraged unless expressly authorized by statute. In admiralty there is an express statute enacted in 1926 (28 U. S. Code, Sec. 227) allowing appeals from interlocutory decrees "determining the rights and liabilities of the parties." In the face of the public policy against repealed appeals in the same case it is respectfully submitted that the scope of that specific statute should not be extended by construction to other orders not contemplated by that statute.

Furthermore this case is governed by a specific section

of the United States Arbitration Act governing admiralty cases (9 U. S. Code, § 8) and under that act there is a continuing jurisdiction in a single court, the admiralty court, from the time the libel is filed until judgment is eventually filed upon the award of the arbitrators.

The New York Cases Cited by Respondents.

With respect to the New York cases cited by respondents, it has been called to our attention that they depend upon section 6-a of the New York Arbitration Law expressly cited in the Goldston case (238 N. Y. 22), upon which is based the Marchant case (252 N. Y. 284). Section 6-a declares arbitration under a contract to be a "special proceeding." No such provision is contained in the United States arbitration act.

Furthermore, under New York practice, the rule with respect to appeals and as to what constitutes an appealable order is governed by statutes entirely different in their scope. See, for example, Secs. 609 and 588 of the New York Practice Act permitting appeals from many interlocutory orders and Section 631 specifically permitting appeals from orders in special proceedings.

The clause in the arbitration provision "waiving recourse to the courts at law" does not invalidate the agreement for arbitration.

In their brief petitioners emphasized that part of the arbitration clause quoted above as indicating an attempt to avoid the jurisdiction of the courts and this respondents argue vitiates the entire arbitration clause. We replied by stating (p. 23) that the parties can not by agreement oust the review allowed by law over the acts of arbitrators and that the arbitration clause here must be construed to assume that in agreeing to arbitration these parties contemplated they would be subject to the laws governing arbitration.

We cited no authority at that time, but since our attention has been called to a recent decision by the Circuit Court of Appeals for the Eighth Circuit, and to some language by Mr. Justice Cardozo in one of the cases mentioned in the brief.

In the case of

> McCullough v. Clinch-Mitchell Const. Co., 71 F. (2d) 17 (certiorari denied October 8, 1934),

there was involved an arbitration clause containing a provision similar to and more drastic than the one here under discussion. The clause in the McCullough case provided for the finality of the decision of the arbitrator and went on to provide that

> "each and every of said parties hereby waives any and all right of action, suit or suits, or other remedy, in law or otherwise, under this agreement or arising out of the same."

There, as here, it was contended that the invalidity of the waiver vitiated the arbitration clause. However, that court, after admitting the waiver to be invalid, declares (71 F. (2d) 21):

> "But this failure of the waiver clause does not necessarily mean that the entire arbitration clause is dragged down by the weight of that invalidity.
>
> "It is the duty of the court to preserve as much of the contract as may properly survive. If the remainder of this provision is complete and it can be gathered that the parties intended it to operate irrespective of the waiver clause, then the balance of this provision should be preserved."

The court points out that the waiver clause emphasizes the intent of the parties to submit to arbitration. As there said:

> "It is obvious that the place of the waiver clause was purely to give added effect to the decision of the

> engineer. The provision for arbitration is complete without it."

The court goes on to declare (71 F. (2d) 22) that:

> "with the complete provision as to arbitration with the above waiver clause eliminated, we cannot believe that the parties here had in mind that arbitration would be undesirable if decisions thereunder did not bar legal remedies.
>
> "The waiver was intended to add effectiveness to an award or decision but the declared purposes of the entire provision were made highly effectual without the waiver clause. We think the arbitration clause is valid and should be upheld."

It is interesting to note that the waiver clause in the original contract in German is "unter Verzicht auf Anrufung der ordentlichen Gerichte", and that while we believe the correct translation to be "waiving recourse to the courts at law" it was originally translated as "subject to the laws applicable thereto" (Transcript, pp. 38, 20, 28). The effect of the McCullough case is to restore this original translation.

In connection with the principle of giving effect to the dominant intention of the agreement to arbitrate, regardless of unenforcible detail, should be cited the illuminating opinion of Mr. Justice Cardozo in

> Marchant v. Mead Mfg. Co., 252 N. Y. 284, 169 N. E. 386.

There the court declares (169 N. E. 386, 389-390):

> "Contracts to submit to arbitration must answer to like tests. * * * There may be a dominant intention to arbitrate at all events, the machinery of selection being merely modal and subordinate. If so, the failure of the means will not involve as a consequence the frustration of the end."

A number of arbitration cases are discussed and the rule said to be to give effect to arbitration clauses although it may be necessary to disregard details provided for specifically by the parties.

Some Additional Citations.

In the case of

Lee v. Swedish American Line, 6 F. Supp. 342,

the district court of New York holds valid against a three-year-old infant travelling on her mother's ticket a clause therein requiring 45 days notice of claim and suit within a year thereafter.

This is in accord with several other cases cited by us as holding a minor bound by the provisions of a ticket for breach of which suit is brought.

Certainly if the infant's claim on a contract may be barred altogether by contract provisions it is not unreasonable to submit that claim to decision by arbitration. In either case, where the minor relies upon a contract as a basis for suit, he should be held to take it as a whole, and not permitted to rely only upon such parts as are favorable.

It is significant that the New York Arbitration Act as adopted in 1921 forbade infants from making arbitration agreements (Practice Act, § 1448). However when Congress enacted its Arbitration Act, taking the New York Act as its model, it expressly omitted that part referring to minors. There is no inherent reason why cases involving minors should be differentiated. It is true minors have no right to make contracts, but where they sue on a contract made for their benefit, all the cases require them to take that contract as they find it, and not to delete that part which they do not like, holding the other party to the rest of the contract.

CONCLUSION.

The order appealed from was interlocutory and not appealable. However, if this court rules otherwise and considers the validity of the arbitration clause, it is respectfully submitted that the clause is valid and enforcible and that the action of the trial judge in directing arbitration was proper and should be affirmed.

Respectfully submitted,

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